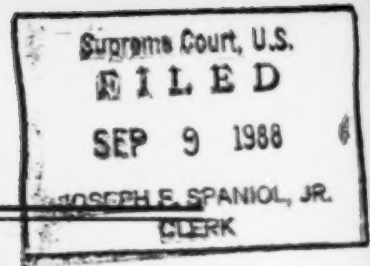


(2)
No. 88-234



IN THE
Supreme Court of the United States
OCTOBER TERM 1988

FLORIDA POWER & LIGHT COMPANY, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA AND
UNITED STATES NUCLEAR REGULATORY COMMISSION,
Respondents

On Petition For a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF NATIONAL TAXPAYERS UNION, CITIZENS
FOR A SOUND ECONOMY, CONSUMER ALERT, AND
AMERICANS FOR TAX REFORM AS AMICI CURIAE IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.....	4
A. The NRC "Fees" Do Not Charge for Specific Benefits to Those Paying the Fee, But Rather for Broad Benefits to the Gen- eral Public, Thereby Raising Fundamental Constitutional Concerns.....	4
B. The NRC Fees Should Be Struck Down, Either Because They Are Contrary to <i>Na- tional Cable</i> , or, if Section 7601 Is Read to Authorize Such Fees, Because the Fees Involve an Unconstitutional Delegation of the Power to Tax.....	9
CONCLUSION	13

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Burnley v. Mid-America Pipeline Company</i> , No. 87-2098, October Term 1987.....	8
<i>Central & Southern Motor Freight Tariff Ass'n. v. United States</i> , 777 F.2d 722 (D.C. Cir. 1985)	11
<i>Industrial Union Department, AFL-CIO v. American Petroleum Institute</i> , 448 U.S. 607 (1980)	12
<i>Interstate Natural Gas Ass'n. of America v. FERC</i> , Nos. 87-1570, et al. (D.C. Cir. filed Oct. 9, 1987) ...	9
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	7
<i>Mid-America Pipeline Company v. Dole</i> , No. 86-C-815E, (N.D. Okla. filed Sept. 4, 1986)	8,12
<i>Mid-America Pipeline Company v. FERC</i> , No. 87-C-571E (N.D. Okla. filed July 20, 1987)	9
<i>Mississippi Power & Light Co. v. NRC</i> , 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980)	12
<i>National Association of Broadcasters v. FCC</i> , 554 F.2d 1118 (D.C. Cir. 1976)	11-12
<i>National Cable Television Ass'n., Inc. v. United States</i> , 415 U.S. 336 (1974)	passim
<i>Sohio Transportation Co. v. United States</i> , 766 F.2d 499 (Fed. Cir. 1985)	11
STATUTES	
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272:	
Section 5002, 47 U.S.C. §§ 156, 158	4
Section 7005, 49 U.S.C. App. § 1682a	4
Section 7601, 42 U.S.C. § 2213	passim
Section 13031, 19 U.S.C. § 58c.....	4
Independent Offices Appropriation Act	
31 U.S.C. § 9701	9,10
Omnibus Budget Reconciliation Act of 1986	
Section 3401, 42 U.S.C. § 7178	4
Omnibus Budget Reconciliation Act of 1987	
Section 10511, 26 U.S.C. § 7801	4

OTHER

U.S. Const., art. I, § 8, cl. 1	8
51 Fed. Reg. 24,078 (1986)	4
51 Fed. Reg. 33,224 (1986)	4
Aranson, Gellhorn & Robinson, <i>A Theory of Legislative Delegation</i> , 68 Cornell L. Rev. 1 (1981)	12
Ely, <i>Democracy and Distrust, A Theory of Judicial Review</i>	12
Freedman, <i>Crisis and Legitimacy: The Administrative Process and American Government</i> (1978)	7,12
Gillette & Hopkins, <i>A Report to the Administrative Conference of the United States on Federal User Fees—Part A: Analysis of Legal and Economic Issues</i> , May 1987	5
Note, <i>The Assessment of Fees by Federal Agencies for Services to Individuals</i> , 94 Harv. L. Rev. 439 (1980)	12
Note, <i>Constitutional Problems with the COBRA and OBRA Fee Schedules</i> , 9 Energy L.J. 107 (1988)	12
Schoenbrod, <i>The Delegation Doctrine: Could the Court Give it Substance?</i> , 88 Mich. L. Rev. 1223 (1984)	12
Tribe, <i>American Constitutional Law</i> (2d ed. 1988)	12



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AMERICANS FOR TAX REFORM AS AMICI CURIAE IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

Amici curiae National Taxpayers Union ("NTU"), Citizens for a Sound Economy ("CSE"), Consumer Alert, and Americans for Tax Reform ("ATR") submit this brief in support of the Petition for a Writ of Certiorari ("Petition") filed by Florida Power & Light Company, et al., seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Florida Power & Light Company v. United States*, 846 F.2d 765 (D.C. Cir. 1988).¹ All parties have consented in writing to the filing of this brief, and copies of the consents have been filed with the Clerk.

¹ The opinion of the Court of Appeals appears in the Appendix of the Petition ("Pet.App.") at 1a-32a.

INTEREST OF AMICI CURIAE

The National Taxpayers Union, Citizens for a Sound Economy, Consumer Alert, and Americans for Tax Reform are nonprofit organizations² dedicated to the promotion of economically sound and just government policies in the public interest. NTU, with 150,000 members nationwide, focuses on tax policy, among other issues, as does ATR. Consumer Alert, with 6,000 dues-paying members in 50 states, focuses on consumer interest in a broad range of issues, including tax policy questions. CSE, with 250,000 members nationally, focuses on the public interest in a strong, growing economy, which centrally involves tax and budget policies.

These four organizations all work to hold legislators publicly accountable for their positions on tax policy issues. Legislators can evade such accountability, however, if they are allowed to delegate the power to impose taxes or charges under the cover of vague language which does not clearly and expressly state what tax policies are to be followed. The decision of the majority below, however, seems to approve such evasion. By so doing, it undermines not only the ability of public interest organizations like the *amici* to hold legislators accountable, but the effectiveness and integrity of the democratic process generally. The *amici* support the granting of the requested writ of certiorari both to preserve their ability to hold legislators publicly accountable and to advance the general public interest in maintaining the important safeguards established by this Court in *National Cable Television Association, Inc. v. United States*, 415 U.S. 336 (1974) ("National Cable").

SUMMARY OF ARGUMENT

This case presents important questions of law, which are raised by an increasing number of statutes delegating the power to set fees, one of which is already before this Court. Moreover, the decision of the majority below directly conflicts with *National Cable*, sharply narrowing its reach and the important safeguards it provides.

² NTU, CSE and ATR have each qualified for tax exemption under Section 501(c)(4) of the Internal Revenue Code. Consumer Alert has qualified for tax exemption under Section 501(c)(3) of the Code.

Under Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 42 U.S.C. § 2213, Pet.App. 62a-63a, the Nuclear Regulatory Commission ("NRC" or "Commission") has imposed fees on some of its licensees. These fees are not assessed in return for specific benefits rendered to the licensees, but rather for broad benefits to the general public such as public health and safety. As such, these charges are more in the nature of taxes rather than user fees. In granting the power to impose such broadly discretionary taxes to Federal agencies by means of language which fails clearly and expressly to indicate the policies adopted, Congress can evade democratic accountability for such taxes.

National Cable addressed this problem by establishing a general principle of interpretation applicable to all fee statutes: absent a clear and express statement delegating the power to impose taxes unrelated to benefits, the courts are to interpret such statutes as providing for true user fees. That is, the agencies are limited to charging only for specific benefits to each feepayer. Just as with the statute considered in *National Cable*, Section 7601 of COBRA lacks a clear and express statement delegating the power to tax unrelated to benefits. Consequently, Section 7601 must also be interpreted in accordance with the rule laid down in *National Cable*. If the Section is read as allowing the fees imposed by NRC, then it is an unconstitutional delegation of the power to tax.

The *amici* submit, therefore, that this Court should issue the requested writ of certiorari to review the decision of the court below.

ARGUMENT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

A. The NRC Fees Do Not Charge for Specific Benefits to Those Paying the Fee, But Rather for Broad Benefits to the General Public, Thereby Raising Fundamental Constitutional Concerns.

Section 7601 of COBRA is just one leading example of a growing trend which constitutes a significant new development in tax policy.³ The Section in general authorizes the NRC to impose annual fees on its licensees. The actual fees imposed by the NRC under this Section do not charge for the cost of specific services providing value to individual licensees. Rather, they charge the licensees for the costs of NRC activities that serve broad interests of the general public, such as public health and safety. 51 Fed. Reg. 24,078-82 (1986); 51 Fed. Reg. 33,224-31 (1986). The important questions of Federal law presented by this case are whether Section 7601 can be properly interpreted as delegating the authority to impose such fees, and if so whether such a delegation is constitutionally permissible.

In *National Cable*, this Court required that fees analogous to those in the instant case be limited to the cost of specific services which provide specific value directly to those paying the fees. As such, the Court provided a correct definition of true

³ Among other recent statutes which have delegated authority to set fees, Section 7005 of COBRA, 49 U.S.C. app. § 1682a, provides for the Department of Transportation ("DOT") to impose fees on usage of natural gas and hazardous liquid pipelines to finance the costs of the Department's pipeline safety program. Section 5002 of COBRA, 47 U.S.C. §§ 156, 158 provides for the Federal Communications Commission to impose charges to finance its regulatory activities. Section 13031 of COBRA, 19 U.S.C. § 58c, provides for the U.S. Customs Service to establish similar fees. Section 3401 of the Omnibus Budget Reconciliation Act of 1986, ("OBRA 1986") 42 U.S.C. § 7178, provides for the Federal Energy Regulatory Commission ("FERC") to establish fees on oil and gas pipelines and public utilities to finance its activities. Section 10511 of the Omnibus Budget Reconciliation Act of 1987, 26 U.S.C. § 7801 provides for the Secretary of the Treasury to impose fees to recover costs of the Internal Revenue Service.

user fees. See Gillette and Hopkins, *A Report to the Administrative Conference of the United States on Federal User Fees-Part A: Analysis of Legal and Economic Issues* (May 1987). As noted in the Petition at 12, user fees complying with this standard are sharply limited as to who will pay and the amount to be paid. The fees can be assessed only against those who individually receive specific, direct benefits from the agency, usually through their own voluntary application, and the amount of the fee is limited to the agency's costs in providing the benefit.

Fees that do not comply with this standard, like the NRC charges at issue in this case, are not true user fees. Rather, they are more in the nature of taxes, raising funds to finance government programs for the benefit of the general public. Gillette and Hopkins, *supra*, at 77. Indeed, as the NRC and the majority below interpret Section 7601, the Commission has almost unbridled discretion to determine who among its licensees should have to bear the fees, and how much each should have to pay. See Petition at 17-18. Such broad, arbitrary discretion is characteristic of taxes, not user fees, as this Court explained in *National Cable*, saying,

Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. 415 U.S. at 340.⁴

When Congress grants this power to impose broadly discretionary taxes to a federal agency, fundamental concerns are raised regarding the operation of our democratic process. Senators and Congressmen can avoid democratic accountability if they can delegate the power to tax under the cover of vague

⁴ The majority below revealed that it failed to understand the central issue in this case when it characterized Petitioners' argument as inviting a "metaphysical debate" over whether the NRC annual charge is a "fee" or a "tax." As Petitioners note, the question is instead whether delegated power to impose charges will be open-ended without meaningful restriction, or subject to the well-defined limitations of user fees as elaborated by this Court in *National Cable*. Petition at 12.

generalities that do not clearly and expressly state what they are voting for. Each of the *amici* is heavily involved in efforts to hold elected officials accountable on tax issues, and can see the impact such delegation would have on their own activities. Holding a legislator accountable requires effective communication to voters concerning what the legislator has voted for and against and how that affects them. But such an effort can be shortcircuited if a Senator or Congressman can claim that he or she has simply voted for "fairness" and other generalities in the authorizing legislation, and that the taxes were imposed by a remote agency over which the legislator has no direct control. When the agency has the discretion to choose both who is to be subject to the tax and the amount to be assessed, the opportunity to deny responsibility on the part of legislators is even greater. Effectively communicating to the public a legislator's responsibility for such matters is feasible only when legislators are required to adopt, by public and recorded votes, legislation which clearly and expressly states the tax policies being adopted.

The activities of Americans for Tax Reform offer a specific example of the problem. ATR conducts a nationwide Pledge Campaign each election year, asking Congressional candidates to pledge not to vote to raise taxes if elected. Hundreds of candidates, both Democrats and Republicans, took the Pledge in 1986, and the same campaign is underway this year. But members of Congress can evade the Pledge if they can delegate the power to tax to Federal agencies while disclaiming responsibility for raising taxes. Explaining to the public who should be held accountable in this case and why, and overcoming the legislator's own denial of responsibility, may be impossible. In any event, such an effort is much more difficult than communicating that an official has directly voted to increase taxes in violation of the Pledge, in a recorded vote which cannot be denied.

The issue is not merely a matter of the ability of the *amici* to perform their functions. The public interest lies in maximizing the control of the voters over the critical legislative power of taxation. The only way to assure that the taxing power is not abused is to require that those most directly accountable through the democratic process make the decisions

regarding taxation. As Chief Justice John Marshall wrote in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819),

The only security against the abuse of this power [of taxation] is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

See also Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 85-88 (1978). Allowing legislators to grant to others the power to impose taxes unrelated to benefits without a clear and express statement of what they are voting for places an undue burden on the operation of the democratic process and substantially weakens democratic control over the critical taxation power.

This weakening of democratic control is of particular concern when dealing with the power to tax. The very founding of our nation grew out of the insistence of our people on democratic control over taxation. As Professor James Freedman has written,

The power to tax is surely one of the most important of the legislative powers created by the Constitution. In the history of other nations, as the Framers had good reason to know, the power to tax had proved strikingly susceptible to oppressive application and abuse Rhetoric decrying taxation without representation was a part of the Framers' revolutionary heritage, affording them particular cause to construct protections against the possibility that such a momentous power might come to be exercised by small numbers of men in dark ministries. The decision of the Framers to place the power to impose taxes in the legislative branch of government was a response to these considerations.

Id. at 85. Indeed, the Constitution provides that all tax bills shall originate in the House of Representatives, the body closest to the people where representatives are elected every two years. U.S. Const., Art. I, § 8, cl. 1. In so doing, the framers indicated

precisely their desire to maintain democratic accountability and control over the power to tax.

Such concerns are what led this Court in *National Cable* to limit the fees in that case to charging only for the cost of providing specific benefits directly to the individual fee-payers. The Court said,

It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U.S.C. § 483, narrowly as authorizing not a "tax" but a "fee."

415 U.S. at 341. See also 415 U.S. at 342 (reading the Act in that case "narrowly to avoid constitutional problems" involving delegation of the power to tax); *Mid-America Pipeline Company v. Dole*, No. 86-C-815E (N.D. Okla. slip opinion, August 5, 1987) (striking down fees imposed by DOT under Section 7005 of COBRA as involving an unconstitutional delegation of the power to tax).

The importance of these concerns is heightened by the fact that Section 7601 is part of a broad trend imposing taxes denominated as "fees" or "charges." Congress has increasingly provided for fee-setting authority by federal agencies as a means to raise revenues.⁵ These fee statutes (and others Congress will undoubtedly pass in the future) present the same concerns and questions of interpretation and constitutionality as does Section 7601 in this case.

In fact, these same questions are already before this Court in *Burnley v. Mid-America Pipeline Company*, No. 87-2098, October Term, 1987. In that case, the United States District Court for the Northern District of Oklahoma struck down the DOT fees adopted under Section 7005 of COBRA, as involving an unconstitutional delegation of the power to tax. The Government has appealed that decision to this Court, noting correctly that the decision of the majority below in the present case is in direct conflict with the decision in *Mid-America Pipeline*, and that the two cases present similar questions of substantial importance. Jurisdictional Statement, *Burnley v.*

⁵ See, *supra*, at 4, n.3.

Mid-America Pipeline Company, No. 87-2098 (June 23, 1988). Moreover, the FERC fees adopted under Section 3401 of OBRA 1986 are under challenge in six consolidated proceedings in the District of Columbia Circuit, *Interstate Natural Gas Ass'n of America v. FERC*, Nos. 87-1570 et al. (D.C. Cir. filed Oct. 9, 1987), and also in proceedings before the same Federal district court which struck down Section 7005 of COBRA as unconstitutional, *Mid-America Pipeline Company v. FERC*, No. 87-C-571E (N.D. Okla. filed July 20, 1987).

Given the fundamental importance of the issues presented by this case, the fact that the issues are already before this Court in *Mid-America Pipeline*, and the increasing number of statutes which present these issues, *amici* urge this Court to issue the requested writ of certiorari to review the decision below. Moreover, as discussed further, *infra*, the decision of the majority below directly conflicts with the decision of this Court in *National Cable*. As a result, we submit that the decision below must be reviewed and corrected.

B. The NRC Fees Should Be Struck Down, Either Because They Are Contrary to *National Cable*, or, if Section 7601 Is Read to Authorize Such Fees, Because the Fees Involve an Unconstitutional Delegation of the Power to Tax.

This Court in *National Cable* struck down fees imposed by the Federal Communications Commission ("FCC") under the Independent Offices Appropriation Act ("IOAA"), 31 U.S.C. § 9701, Pet.App. 64a. Despite the broad language of the IOAA, the Court held that the FCC could charge fees only to cover the costs of specific services which provide particular benefits to those being charged, that is, benefits "not shared by other members of society". 415 U.S. at 340.

The decision in *National Cable* was not based on an exploration of the statutory language or legislative history of the IOAA. Rather, the decision stemmed from the con-

stitutionally based concerns discussed above, concerns which are presented by all fee statutes. To address these concerns, the Court established a general principle of interpretation that applies to all such statutes: absent a clear and express statement delegating the power to impose taxes unrelated to benefits received, the courts are to interpret such statutes as providing for user fees which charge each feepayer only for the costs of specific services providing particular value directly received by the feepayer. Because the Court in *National Cable* found no such clear and express statement in the IOAA; it held that agencies only have authority under that statute to assess and collect user fees as circumscribed by the Court; they do not have the power to impose what amount to open-ended taxes.

By requiring a clear and express statement of delegation of the power to assess charges unrelated to benefits, the *National Cable* doctrine limits the circumstances where such broad based delegations will be upheld. As such, the doctrine directly addresses the public interest in democratic accountability, because legislators are thereby required to state clearly and expressly what they are voting for.

As noted by Petitioners, Section 7601 of COBRA lacks a clear and express statement delegating the power to impose taxes unrelated to benefits. That is precisely the defect of the IOAA provision addressed by this Court in *National Cable*. Petition at 12-13. The holding in *National Cable*, consequently, requires that Section 7601 be interpreted as providing for user fees which charge each beneficiary only for the costs of specific services providing value directly to the individual feepayer being charged. Judge Starr recognized in dissent below that Section 7601 of COBRA presents "the identical situation" that confronted this Court in *National Cable* "when it first addressed the IOAA," and, that therefore, Section 7601 must also be construed narrowly. As Petitioners note, this is not an argument that fees under Section 7601 of COBRA must comply with the statutory standards of the IOAA or that the IOAA provides for the constitutional outer limits of delegable fee setting authority, as respondents argued below. Rather, it is a recognition that *National Cable* established a general principle of interpretation that applies as well to the language of Section 7601 of COBRA. Petition at 13.

The majority below failed to apply the principle of interpretation established by *National Cable*. By so doing, they failed to address the fundamental, constitutionally-based concerns discussed above. If the decision of the majority below is allowed to stand, *National Cable's* important legal safeguards protecting democratic accountability and control over the power to tax will be eliminated. The *amici* submit that this Court should issue the requested writ of certiorari and reaffirm the continuing validity of *National Cable*.

If Section 7601 is read to authorize the NRC annual fees, then the section contains no effective standards to guide the delegation of the taxing power. Lacking such standards, the section is an unconstitutional delegation of the power to tax. It leaves the Commission with virtually unlimited discretion to determine who among its universe of licensees have to pay the fees, and how much each will have to pay, from \$0 to \$1 million per year or more. Petition at 17-18.

If the delegation of such power to the NRC under Section 7601 is allowed to stand it is difficult to see how there can be any effective limitation on delegations of the power to tax. A legal precedent would be set for wide-ranging delegations that would fundamentally change the way taxes are adopted and imposed in our society. Under this precedent, Congress might by analogy delegate to the Internal Revenue Service the power to raise taxes to balance the budget, guided only by standards as vague as those provided in Section 7601—e.g., that “the tax burden be reasonably related to ability to pay,” or that “unmanageable, harsh or discriminatory tax burdens be avoided” or that “the agency take into account likely impacts on the economy.” Allowing such delegations would seriously undermine democratic accountability and control over the power to tax, contrary to the most fundamental traditions of our nation. See discussion, *supra*, at 5-8.

Numerous courts have suggested that such open-ended delegations of the power to tax would be unconstitutional.⁶ The view of these courts is essentially that the power to impose

⁶ *National Cable*, 415 U.S. at 340; *Central & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 725 (D.C. Cir. 1985); *Sohio Transportation Co. v. United States*, 766 F.2d 499, 503 (Fed. Cir. 1985); *National*

(footnote continues)

charges unrelated to benefits is inherently too broad and without meaningful standards or limitations to be validly delegated.

However, as Petitioners argue, Petition at 19-20, even if delegation of the power to assess taxes is not *per se* unconstitutional, the standards of Section 7601 are insufficient to allow such delegation. Statutes attempting to delegate the critical power to impose taxes should be required to include stricter standards and more limited discretion than other delegations. Note, *The Assessment of Fees by Federal Agencies for Services to Individuals*, 94 Harv. L. Rev. 439, 443 (1980). But even under the usual requirements for a permissible delegation, the delegation in this case should be unconstitutional. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645-646 (1980); *Mid-America Pipeline Company*, *supra*, slip opinion. As discussed above, under the interpretation of the NRC and the majority below, the standards of Section 7601 are effectively meaningless, leaving the Commission virtually unfettered discretion to determine who among its licensees shall pay and how much they will pay.

The delegation doctrine is a keystone in the protection of our nation's liberties and democratic system of government. But if the doctrine is to fulfill this critical role, delegations can only be found to satisfy constitutional requirements when Congress provides substantive standards clearly circumscribing the delegated power. Ely, *Democracy and Distrust, A Theory of Judicial Review* 131-134; Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1984); Aranson, Gellhorn and Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1981); Freedman, *supra*, p. 7, at 78-94; Tribe, *supra*, p. 11, n.6, §§ 5-17, at 362-369.

(footnote continued)

Association of Broadcasters v. F.C.C., 554 F.2d 1118, 1129, n. 28 (D.C. Cir. 1976); *Mississippi Power & Light Co. v. NRC*, 601 F.2d 223, 227 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *Mid-America Pipeline Co. v. Dole*, slip op. at 12; See also Tribe, *American Constitutional Law* §§ 5-17, at 366, n.15 (2d ed. 1988); Freedman, *supra*, p. 7, at 88; Note, *Constitutional Problems with the COBRA and OBRA Fee Schedules*, 9 Energy L.J. 107 (1988).

CONCLUSION

For the reasons stated, a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be issued and the case set for plenary review.

Respectfully submitted,

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